

8-3100-9588-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF VETERANS AFFAIRS

John J. Kozitka,
Petitioner,

v.

City of Detroit Lakes,
Respondent.

ORDER DENYING
RESPONDENT'S MOTION
FOR SUMMARY DISPOSITION

A motion requesting summary disposition of the above-entitled matter was filed by the City of Detroit Lakes ("City" or "Respondent") on April 24, 1995. William J. Everett, attorney with Greene Espel, 333 South Seventh Street, Suite 1700, Minneapolis, Minnesota 55402, filed the motion on behalf of the City. Charles A. Krekelberg, Krekelberg Law Firm, 10 North Broadway, P.O. Box 353, Pelican Rapids, Minnesota 56572, filed a countermotion on behalf of Petitioner, John J. Kozitka. The record on this motion closed on May 8, 1995, with the receipt of the City's reply brief.

Based upon all of the records, files, and argument herein, and for the reasons set forth in the following Memorandum, the Administrative Law Judge makes the following:

ORDER

Respondent's motion for summary disposition is DENIED.

Dated: May __, 1995

JON L. LUNDE
Administrative Law Judge

MEMORANDUM

Summary disposition is the administrative equivalent to summary judgment and the same standards apply. Minn. Rule 1400.5500(K). On a motion for summary disposition, any factual dispute must be taken in the best light to the nonmoving party. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955). To defend against such a motion, a petitioner must demonstrate that all the elements of the case are present and that genuine issues of material fact remain for hearing. Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn.App. 1989)(citing Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2552-53 (1986)). The nonmoving party cannot rely upon assertions, but must show

“significantly probative, not merely colorable” evidence supporting those issues. Albert v. Paper Calmenson & Co., 515 N.W.2d 59, 64 (Minn.App. 1994)(citing Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986) and Carlisle v. City of Minneapolis).

The procedural facts underlying this matter are undisputed by the parties. Kozitka is an honorably discharged veteran entitled to the protections of the Veterans Preference Act. Kozitka was employed by the City from 1978. He was terminated from employment by the City on July 28, 1988. No notice of hearing was provided at the time of Kozitka's discharge. On February 26, 1993, Kozitka, through his attorney, requested reinstatement and backpay based on the City's failure to comply with the Veterans Preference Act.

On March 9, 1993, the City sent Kozitka a letter advising him of his right to a hearing. On March 18, 1993, Kozitka, through his counsel, disputed the validity of the notice due to the City's completed discharge.

Petitioner filed a complaint, dated September 8, 1993, in the District Court in Becker County. That action was dismissed for a lack of subject matter jurisdiction. Petitioner appealed the dismissal to the Minnesota Court of Appeals, which upheld the dismissal by an unpublished opinion issued on December 23, 1994. Respondent seeks to dismiss this matter on the ground that Kozitka did not file a request for a hearing within 60 days of the notice being given of his right to a hearing.

Under the Veterans Preference Act, a veteran must be notified of the right to a hearing when a public employer removes the veteran. Minn. Stat. § 197.46. Failure to request a hearing within sixty days after notification of the right to a hearing constitutes a waiver of that right. Id. A veteran may petition the Commissioner of Veterans Affairs to enforce any rights denied by the state or any political subdivision. Minn. Stat. § 197.481, subd. 1. There is no time limit on when the petition must be filed.

The City asserts that the failure of Petitioner to file a request for hearing within sixty days of the notice provided on March 9, 1993, precludes Kozitka from any hearing on his veterans preference rights. On this issue, the Court of Appeals stated:

The VPA [Veterans Preference Act] provides an alternate remedy in the form of a veterans preference hearing. Minn. Stat. § 197.46 (1992). But Kozitka did not request a veterans preference hearing within 60 days of the date he was properly discharged by the city. Kozitka therefore waived such a hearing. See id. (failure to request a hearing within 60 days constitutes a waiver of the right to a hearing and all other remedies for reinstatement).

Kozitka v. City of Detroit Lakes, 1995 WL 1497, Docket No. C5-94-716 (Minn.App. January 3, 1995)(footnote 1).

The Court of Appeals did not stop with this analysis, however. The Court went on to state:

The VPA provides the following remedy when a veteran claims that he has been denied his right to notice and a hearing:

A veteran * * * may petition the commissioner of veterans affairs for an order directing the agency to grant the veteran such relief the commissioner finds justified.

Minn. Stat. § 197.481, subd. 1 (1992). Pursuant to this statute, the Commissioner may conduct a hearing and decide back pay issues. Cf. Henry v. Metropolitan Waste Control Comm'n, 401 N.W.2d 401, 404 (Minn.App. 1987) (affirming Commissioner's award of back wages where veteran was discharged without notice of his rights under the VPA). A party may appeal the Commissioner's order to this court by writ of certiorari. Minn. Stat. § 197.481, subd. 6. Therefore, while we affirm the district court's determination that it lacked jurisdiction over Kozitka's lawsuit, we conclude that Kozitka's proper remedy would not be to petition this court for a writ of certiorari, but to petition the Commissioner pursuant to Minn. Stat. § 197.481, subd. 1 for a hearing on Kozitka's claim for reinstatement and back wages.

Kozitka, supra.

The Notice of Petition and Order for Hearing in this matter indicates that this matter is before the undersigned Administrative Law Judge pursuant to Minn. Stat. § 197.481. The Court of Appeals has indicated that this statute provides the "proper remedy" for Complainant's cause of action. There is no time limit set on the right to petition the Commissioner of Veterans Affairs under section 197.481. Hence, there is no basis for dismissing Kozitka's Petition. His claim for back wages is not time-barred, and genuine issues of material fact remain over rights and remedies under the Veterans Preference Act. Summary disposition is not appropriate.

J.L.L.